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IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 2

I. Transactions In Which The Plaintiff Makes No Purchase Cannot Satisfy The Act's "Purchaser" Requirement 2

II. Sales Lost To Unrelated Third Parties, Rather Than Favored Purchasers of the Seller, Are Not Cognizable Competitive Injuries Under The Act 3

III. The Approach of the Appeals Court Would Inhibit Competition By Chilling the Use of Competitive Bidding 4

CONCLUSION 7

TABLE OF AUTHORITIES

Pages

CASES

Automatic Canteen Co. of America v. FTC,
346 U.S. 61 (1953) 5
Best Brands Beverage v. Falstaff Brewing Corp.,
842 F.2d 578 (2d Cir. 1987) 3-4
Blue Chip Stamps v. Manor Drug Stores,
421 U.S. 723 (1975) 6
Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 6
Great Atlantic & Pacific Tea Co. v. FTC,
440 U.S. 69 (1979) 5, 6
Infusion Res., Inc. v. Minimed, Inc.,
351 F.3d 688 (5th Cir. 2003) 4
Jefferson County Pharm. Ass'n v. Abbott Labs.,
460 U.S. 150 (1983) 5
Metro Ford Truck Sales, Inc. v. Ford Motor Co.,
145 F.3d 320 (5th Cir. 1998) 2
National Distillers & Chem. Corp. v. Brad's Mach. Prods.,
666 F.2d 492 (11th Cir. 1982) 4
Perkins v. Standard Oil Co.,
395 U.S. 642 (1969) 3
Stelwagon Mfg. Co. v. Tarmac Roofing Sys.,
63 F.3d 1267 (3d Cir. 1995) 4
Texaco, Inc. v. Hasbrouck,
496 U.S. 543 (1990) 3

STATUTES

Robinson-Patman Act,
15 U.S.C. § 13(a) ..... *passim*
15 U.S.C. § 13(f) 5

Sherman Act,
15 U.S.C. § 1 5-6

OTHER AUTHORITIES

Donald S. Clark, *The Robinson-Patman Act: General Principles, Commission Proceedings, and Selected Issues* (June 7, 1995) 6
Mark Klock, *Unconscionability and Price Discrimination*, 69 Tenn. L. Rev. 317 (2002) 6

INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the antitrust laws. *See, e.g., Texaco v. Dagher* (Nos. 04-805 and 04-814, petitions filed Dec. 14, 2004); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States Tobacco Co. v. Conwood Co., cert. denied*, 123 S. Ct. 876 (2003); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). WLF filed a brief *amicus curiae* supporting the petition for certiorari in this case.

WLF is concerned that the decision below would greatly expand the scope of unlawful price discrimination beyond the language of the Robinson-Patman Act, particularly in the context of competitive bidding, and would thereby create unjustified liability on the part of product manufacturers and other buyers and sellers of "commodities" under the Act. WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk of the Court.

ARGUMENT

I. Transactions In Which The Plaintiff Makes No Purchase Cannot Satisfy The Act's "Purchaser" Requirement.

The appeals court examined the practice in which Volvo and other truck manufacturers provide discounts on a case-by-case basis to dealers seeking to bid on truck contracts. The court determined that this "industry-standard practice,"[2] Pet. App. 2a, amounted to a violation of the Act where plaintiff alleged that Volvo had offered it a lesser discount (offered a higher wholesale price) than it offered to other dealers involved in different bidding processes for different customers with different requirements. The court conceded that "an unsuccessful bidder is not a purchaser within the meaning of the [Act]." Pet. App. 9a. The court held, however, that losses from plaintiff's unsuccessful bids could nonetheless be a basis of liability and could be incorporated into the damages award. Pet. App. 17a-20a.

The Robinson-Patman Act by its terms indicates that only actual purchasers who have paid a discriminatory price are within the scope of the Act. The Act provides in pertinent part that it is "unlawful . . . to discriminate in price between different *purchasers* of commodities of like grade and quality." 15 U.S.C. § 13(a). The court below erred in holding that non-purchasers, such as the plaintiff here, can obtain money damages under the Act based on bids in which they were unsuccessful and thus led to no purchase.

Except in the four instances where plaintiff allegedly purchased trucks from Volvo at a discriminatory price, the transactions at issue – the losing bids – were outside the scope

[2] *See also Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320 (5th Cir. 1998) (rejecting similar Robinson-Patman Act challenge to Ford's wholesale truck discounting).

of the Act and were not properly included in a damages award. The fact that plaintiff Reeder-Simco GMC was successful in *some* bids does not enable it to make out a Robinson-Patman Act claim with regard to the larger number of bids at issue that led to no purchase by Reeder-Simco GMC. The truck pricing in the unsuccessful bids simply did not make out the elements of a violation of the Act, and thus plaintiff cannot meet its burden with respect to those bids. "Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered." *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969).

II. Sales Lost To Unrelated Third Parties, Rather Than Favored Purchasers of the Seller, Are Not Cognizable Competitive Injuries Under The Act.

To establish a violation of the Act, plaintiff must establish that "the discrimination had a prohibited effect on competition." *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 556 (1990). The competitive injury cognizable under the Act includes "injury to competition between the favored and the disfavored purchaser" – so-called "secondary-line" injury. *Texaco*, 496 U.S. at 571. The Act applies only where "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a).

At least in the context of competitive bidding, this Court should rule that there is no competitive injury in secondary-line cases unless the favored buyer and disfavored buyer are in actual competition with respect to the same specific customer or customers. The Second Circuit articulated this requirement with regard to secondary-line cases generally in *Best Brands*

Beverage v. Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987). "In order to establish the requisite competitive injury in a secondary-line case, plaintiff must first prove that, as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential." 842 F.2d at 584. The Fifth Circuit has stated that in Robinson-Patman Act cases, "competition is determined by careful analysis of each party's customers. Only if they are each directly after the same dollar are they competing." *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692 (5th Cir. 2003). *See also Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267, 1271 (3d Cir. 1995); *National Distillers & Chem. Corp. v. Brad's Mach. Prods.*, 666 F.2d 492, 496 (11th Cir. 1982).

Here, however, all but two of the instances of price discrimination alleged by Reeder-Simco GMC do not involve competition with another Volvo dealer.[3] In allowing claims based on those offers, the court of appeals rejected a requirement of "direct head-to-head competition" between plaintiff and the dealers who allegedly received more favorable terms. Pet. App. 17a. It determined that sales lost to non-Volvo dealers were also cognizable injuries to competition. Yet the plaintiff in those bids was in competition only with dealers of other brands of trucks, and any lost sales and lost profits were lost to those non-Volvo dealers – not to Volvo dealers granted favorable treatment by Volvo.

III. The Approach of the Appeals Court Would Inhibit Competition By Chilling the Use of Competitive Bidding.

"The Court frequently has recognized that strict enforcement of the anti-price-discrimination provisions of the [Robinson-

[3] The two exceptions identified by the court of appeals – the two occasions when plaintiff was bidding against another Volvo dealer for the same deal – were the plaintiff's bid for the sale of twelve trucks to Hiland Dairy Company and its bid for a five-truck sale to Tommy Davidson. Pet. App. 4a, 11a-12a.

Patman Act] may lead to price rigidity and uniformity in direct conflict with the goals of the [Sherman Act]." *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 178 (1983) (O'Connor, J., dissenting). In the specific context of competitive bidding, the Court has recognized that where possible, the Act should not be interpreted in a manner that would "frustrate competitive bidding" and thereby "lead to anticompetitive results." *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80, 81 (1979).

In the context of competitive bidding, there will always be one or more disappointed bidders. Under the theory of the court below, a disappointed dealer-bidder will always have a cause of action under the Act if the manufacturer has previously offered a larger discount to another dealer in connection with a different bidding process (or if the manufacturer subsequently does so). The practical effect of such a doctrine is to eliminate competitive injury as a distinct requirement, and, ultimately, to deter any variations in discounting. This, in turn, will limit the vigor of competition within the competitive bidding process.

The chilling effect on competition within competitive bidding is magnified because the Act also provides for *buyer* liability. Section 2(f) of the Act makes it unlawful for a buyer "knowingly to induce or receive" a discriminatory price prohibited by the Act. 15 U.S.C. § 13(f); *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 73 (1953). While the requirement of "knowing" inducement or receipt of the discriminatory price provides some protection to buyers in theory, this state-of-mind element is a quintessential jury question, and thus may be cold comfort to buyers whose priority is to stay out of court altogether.

Respondents may object on policy grounds that applying the requirements of the statute leaves some price differentials – such as those alleged here – to the discretion of the seller (except to the extent they may independently violate other statutory restrictions, such as § 1 of the Sherman Act, 15 U.S.C.

§ 1). This simply reflects that the text of the Robinson-Patman Act does not prohibit all instances of price discrimination. "[T]he statute as a practical matter could not, and does not, ban all price differences charged to 'different purchasers of commodities of like grade and quality.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). The Act is deliberately limited in scope, generally geared toward maintaining fairness in conventional retail-wholesale pricing programs, not toward policing price differentials wherever they may be found. *Cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (Rule 10b-5 suits available only to actual purchasers and sellers of shares, not to those who are misled by defendant's fraud into not purchasing).

This Court has frequently noted that Congress intended for the Act to address the threat to competition posed by preferential treatment accorded to large retailers. "The Robinson-Patman Act was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 75-76.

This is far from the only dimension in which the terms of the Act are limited in scope. For example, the Act does not cover transactions involving services, applying by its terms only to "commodities." *See* Mark Klock, *Unconscionability and Price Discrimination*, 69 Tenn. L. Rev. 317, 358-61 (2002). Even where commodities are involved, many types of transactions are excluded by virtue of the statute's requirement of actual sales. "The Act does not apply, for example, to long term leases; to mere offers to sell; to acting as an intermediary between a seller and its customers; or to licensing computer software." Donald S. Clark, *The Robinson-Patman Act: General Principles, Commission Proceedings, and Selected Issues* (June 7, 1995).[4] Nor does it apply to bidders in situations

[4] Available for download at http://www.ftc.gov/speeches/other/patman.htm.

where – as here – they make no purchase or are not in competition with other customers of the same seller.

CONCLUSION

For the foregoing reasons and for the reasons stated by petitioner, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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